The Institute Of *Retratto Successorio* Under Maltese Law

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1. Origin and Purpose of *Retratto Successorio*

There was a time when society prioritized the preservation of an estate beyond time. Social mobility was imperceptible. Patrimony and ranking were strongly tied, and every effort was made to exclude persons extraneous to the family from its internal affairs. It is against this archaic setting that the institute of *retratto successorio* must be considered. Remnants of this cultural perception still survive, though it is understood that these traits are doomed to fade away. Is there still a place for the *retratto successorio* within the current framework of the law of succession? This question lies at the heart of the forthcoming discussion on the purpose and development of this institute.

Although different theories have been proposed to explain the origin of the *retratto successorio*, it is generally attributed a French origin[1]. Incidentally, our courts have always referred to the prevalent French doctrine in their judgments on this topic. This discussion will thus depart from a critical study of the historical understanding and development of this institute in French law, and then focus on its interpretation and application under Maltese law.

Baudry Lacantinerie et Wahl[2] report that the Parliament of Paris formally recognized the *retratto successorio* for the first time in 1521. It is thought that this recognition was triggered off by *"peculiari circostanze poiche` gli autori la passano sotto silenzio"*.[3] Despite this initial interest, it was only through judicial

[1] Demolombe, Code Napoleon, Successions, Vol IV, n. 2 ("Cette institution est d'origine française; et elle a été introduite chez nous par la jurisprudence des parlements.")
[2] Trattato Teorico Pratico di Diritto Civile, Delle Successioni (Vol III), Del Retratto Successorio, n. 2576
[3] **ibid**.

pronouncements that the French Parliament was prompted to legislate on this head on the 3rd April 1613. Indeed, both Pothier and Domat overlooked its salient characterisation as a right of redemption in their commentaries on the Code Napoleon.[4] They envisaged the *retratto successorio* as a peculiar remedy against the fraudulent act of the alienor. This early understanding traced the juridical origin of the institute in the Roman notions of *Par Diversas* and *Ab Anastasio*[5]. On the other hand, Demolombe argues that the French legislature's initiative consisted merely in extending the applicability of the right of redemption (attached to litigious rights) to successon law.[7] Other French authors, namely Planiol et Ripert[8] and Lebrun[9] concur in this view.

Lebrun traces the social motivation behind this development. He observes that *"d'ordinario vi e` vessazione o uno strano interesse da parte di un estraneo curioso di apprendere gli affari altrui."*[10] The traditional order in which next of kins are (or permitted to be) called to succeed is rooted in the law's endeavour to assist in the preservation of the estate within the deceased's surviving family.

Clearly enough, this traditional spirit is no longer a *sine qua non* objective of succession law to the extent that the most recent amendments to Maltese succession law reflect a new undertaking of the legislator to ensure the consolidation and free transferability of private property.[11] Other continental jurists argue that *"La ragione di tale istituto sta nell'interesse degli altri condividenti di*

[4] ibid.
[5] ibid.
[7] op. cit.
[8] Traité Pratique de Droit Civil Français, Tome IV, Successions (Paris, 1956) – n. 341 ("Questa facolta` di riscattare un credito litigioso appellasi riscatto litigioso, i parlamenti l'estesero alla cessione di diritti successori, ancorche` nulla avessero di litigioso: cio` dicesi retratto successorio.") These authors also cite Chabot (Raport, n. 59) who tallies with the view that this institute is in complete conformity with the above-cited Roman laws.
[9] Des Successions, Libro IV, Cap. II, n. 66 as cited in Planiol M & Ripert G, ibid.
[10] ibid.
[11] Act XVIII of 2004

allontanare un estraneo che, in virtu` dell'acquisto della quota, s'intrometterebbe nei segreti familiari al posto dell'erede alienante."[12] Our courts have always identified this aspect of *"escludere i non eredi dalla divisione"*[13] as the salient object of the *retratto successorio*.

The general negative outlook[14] on this inroad to the free transferability of private property[15] did not suffice to eradicate this institute from French law. Baudry Lacantinerie et Wahl[16] report that despite its suppression by the legislator, and its formal repeal by a decree of the National Assembly towards the end of the eighteenth century, a procedural impropriety in the legislative process led to the survival of this institute. On a juridical level, the courts[17] continued to uphold the existence of the *retratto successorio* on the ground that its origin was not feudal in nature, and was not therefore within the ambit of the legislative policy to repeal all rights of redemption originating under the feudal regime.

The Code Napoleon contemplated this controversial institute in Article 841:

"Toute personne, même parents du defunt, qui n'est pas son successible, et à laquelle un cohéritier aurait cédé son droit à la

[12] Azzariti, Martinez & Azzariti, Successioni Per Causa di Morte e Donazioni (CEDAM, 7ª Ed., 1979), n. 320; Baudry Lacantineri et Wahl, op. cit, n. 2579 ("la tendenza di conservare i beni nella famiglia")

[13] Antonio Muscat et vs Can. Carmelo Sciberras, Commercial Court, 19.1.1882 cited in note of submissions for the appeal in Emanuel Schembri noe et vs Paul Camilleri et, Court of Appeal, 12.6.2001

[14] Demolombe, op. cit., n. 4 asserts that "l'opinion des jurisconsultes, qui paraissait bien exprimer le sentiment public, s'y montrait fort hostile."

[15] op. cit, n. 13. This view is fully embraced by Laurent, Diritto Civile, Delle Successioni, Vol X, n. 551 ("le retrait successoral joue ainsi le role d'une veritable expropriation pour cause d'utilité privée.")

[16] op. cit., n. 2577; Demolombe, op. cit, n. 12 ("le retrait successoral se recommande comme un moyen de maintenir, au sein des familles, la bonne intelligence et la paix, si bien que la Court de Cassation a pu dire que:«Il importe à la morale et a l'ordre public que des speculateurs étrangers ne soient point associés aux affaires des cosuccessibles» [26 juin 1836, Thorel, D. 1836, I, 252]")

[17] e.g. Cour de Cassation, 20.3.1828, Delivet, D., 1828,I, 185 reported in Demolombe, op. cit., n. 5

[19] Article 831 at the time of this judgment

succession, peut être écartée du partage, soit par les coéeritiers, soit par un seul, en lui remboursant le prix de la cession."

The Cour de Cassation criticized this provision[19] as *"exceptionnelle et évidemment contraire au droit commun, en ce qu'elle tend à priver l'acquéreur de l'avantage d'un traité autorise par la loi, pour en faire profiter, à son prejudice, un tiers, qui n'y a point été partie ..."*[20]. This right of redemption contrasts sharply with the theory of freedom of contract so prevalent among continental jurists at that time. In this respect, Planiol et Ripert[22] argue that:

"Il retratto ostacola l'esercizio d'un diritto naturale; e` evidente che l'erede vendera` a condizioni svantaggiosissime, a causa dei rischi che corre il compratore d'essere privato dei benefizi del suo contratto ... Non vi e materia piu ingrata. E un diritto puramente arbitrario fondato su cattive ragioni; si e` sempre cercato di pronunziarsi compratore contro l'erede che voglia spogliarlo di un contratto vantaggioso."

Similar disfavour can be traced in the relevant commentaries of Baudry Lacantinerie et Wahl[23]. These writers highlight the difficulties encountered by an heir who decides to transfer his hereditary share, and remark that the *retratto successorio* can easily lead to fraudulent behaviour by one or more of the co-heirs and increasing litigation among them. They conclude that *"si dovra' forse deplorare che il legislatore abbia creduto di mantenere il retratto successorio che costituisce una eccezzione a un prrincipio fondamentale del nostro diritto"*, namely that private property can only be expropriated for a public purpose and upon payment of a fair compensation.[24] It was in this spirit that the French Parliament

[20] 21.4.1830, Thillaye, D., 1830, I, 214. This principle was confirmed by the same Court (12.12.1894) rep. Baudry Lacantineri et Wahl, op. cit., n. 2582
[22] op. cit, n. 341
[23] op. cit., n. 2579
[24] Under Maltese law, this right is entrenched as a fundamental human right in Article 37 (1) of Chapter IV of our Constitution

decided, in 1976, to repeal this institute from French law.[25] Notably, the relative repealing law saved all agreements, concluded prior to its enactment, and preserving co-ownership between co-heirs unless the co-heirs agreed to be regulated by the new regime.[27]

On the other hand, the relevant provision of our Civil Code (Article 912) still preserves its original drafting by Sir Adrian Dingli. *"hija tratta mill-Kodici Parmense, mill-Kodici Sardo u mill-Kodici Franciz (v. Nota ta' Sir A. Dingli, art. 615) li huwa simili ghad-disposizzjoni ta' l-art. 760 tal-Kodici tar-Regno delle Due Sicilie"*[28].

Assignee of portion of inheritance may be excluded from partition by co-heirs.

912. (1) *"Where any of the co-heirs has, under an onerous title, assigned his rights over the inheritance to any person, not being a co-heir, the other co-heirs or any of them may, even if the assignee is a relation of the deceased, exclude him from the partition by reimbursing to him the price of the assignment, the expenses incurred on the occasion of such assignment, and the interest on the price as from the day on which such price shall have been paid to the assignor."*

(2) *"The right competent to the co-heirs as aforesaid shall lapse at the expiration of one month from the day on which notice of the assignment shall have been given to the co-heirs, unless within that time they shall have declared their intention to exercise such right."*

[25] Article 17 of Law 76/1286 enacted on the 31st December 1976 and coming into force on the 1st July of 1977

[27] Lucas A & Catala P, Code Civil, 1993-1994 (litec-Paris, 1993), p. 435

[28] Marianna Debono vs Avvocato Dr Antonio Caruana et noe, Court of Appeal, 23.2.1940, XXX.i.182; Emanuel Schembri noe et vs Paul Camilleri et, Court of Appeal, 12.6.2001

(3) *"Where any of the co-heirs shall have exercised such right, the other co-heirs may avail themselves thereof, provided they shall declare their intention to do so within fifteen days from the notice given to them."*

(4) *"Any such notice or declaration shall be given or made by means of a judicial act."*

2. Essential Requisites for the exercise of the *Retratto Successorio*

(i) Against whom may the *Retratto Successorio* be exercised?

Article 912 lays down that this right may be exercised against *"any person, not being a co-heir ... even if [such person is] a relation of the deceased"*. This is a faithful reproduction of the old Article 841 which conferred the right against *"Toute personne, meme parente du defunt, qui n'est pas successible."*

Various interpretations have been ascribed to the term *'successible'*. Baudry Lacantinerie et Wahl hold that *"La parola 'successible' viene usata in senso lato, al pari della parola 'coerede',e designa, conseguentement, ogni persona che succeda al defuno in universum jus: in una parola ogni successore universale o a titolo universale."*[30] Planiol et Ripert take a more pragmatic stance. They argue that *"per successibile bisogna intendere colui che succede al defunto, e che, a questo titolo, e chiamato alla divisione ... Si considera come estraneo colui che non concorre all'eredita`, come successore; egli e' estraneo nel senso che non ha il diritto d'ingerirsi negli affari del defunto."* [31] Demolombe confirms that *"toute cession qui n'a pas été faite par une cohéritier, c'est-à-dire par une personne appelée à prendre part à la succession à titre universel, est affranchie du retrait."*[32] Laurent's enunciation is perhaps the clearest. *"L'étranger se*

[30] op. cit., n. 2599
[31] op. cit.., n. 344
[32] op. cit.., n. 77

definirà [comme] ... toute personne qui n'est pas appelée au partage en qualité de successeur universel, alors même qu'elle aurait à d'autres titres un droit de régard ou de participation dans les operations de ce partage."[33]

In their analysis, these jurists embark on the wholistic exercise of deducing against which figures of succession law the right of redemption can be exercised. One such attempt is made by Planiol et Ripert[34] who take us to consider whether this right can be exercised against whoever acquires the hereditary rights of a person who has renounced to the relevant inheritance. Basing themselves on the decision of the Cour de Cassation of Pau, they state that *"colui il quale cede i suoi diritti successori fa atto d'erede*[35] *puro e semplice, dunque rimane successibile, e se il cedente e successibile, e impossibile che lo sia il cessionario."* The situation would be different if the renouncing heir has subsequently acquired the hereditary rights of a co-heir. Here, he, *"puo` essere escluso dalla divisione, alla quale non ha piu diritto di concorrere se non come cessionario."*[36]

Laurent asks whether the *retratto successorio* can be exercised against a legatee who acquires the rights of a co-heir over the same estate benefiting him by singular title. As a legatee does not continue the personality of the deceased, and is not a co-heir, he can suffer the exercise of the *retratto successorio* on acquiring a share of the inheritance from a co-heir. Another difficulty envisaged by this jurist refers to a bequest by singular title of the usufruct of the estate, or part thereof, to a person who subsequently acquires the hereditary rights of a co-heir. Although the decisions of the Cour de Cassation have not been uniform on this point, Laurent concludes that *"la qualité de successeur en usufruit ne met pas obstacle au retrait, dont l'exercice isolerà le retrayé dans sa situation particulière de legataire de la jouissance, en assignant le*

[33] op. cit.., n. 555
[34] op. cit., n. 344
[35] This principle was enunciated by the Court of Appeal in Ursolina Delicata vs John Doublesin noe, 25.6.1951, XXXV.i.129
[36] op. cit., n. 346; Demolombe concurs in this view.

reste de la succession au groupe de ceux auxquels une trasmission definitive est assurée par la loi ou le testement."[37]

Baudry Lacantinerie et Wahl[38] take us yet into another *scenario*. Where one of the co-heirs transfers his rights over the inheritance to a third party, and subsequently acquires them back, *"[i]l successibile non e` sottoposto al retratto se, dopo avere alienato i suoi diritti, li riacquista in seguito ad annulamento o risoluzione della cessione; o se ... il successibile rientra in possesso"*[39] *"in virtu' di una retrocessione."*[40]

A further question still arising under our law is whether the *retratto successorio* can be exercised against the person entitled to the reserved portion over the deceased's estate. In view of the general principle that *"il-legittimarju ma hux eredi ... huwa biss ghandu porzjoni mill-beni li halla d-decujus li hija rizervata lilu mil-ligi."*[41], the person entitled to the reserved portion would not qualify as a *'co-heir'* for the purpose of Article 912, and would notionally be subject to the exercise of the *retratto successorio* should he acquire by onerous title a share of the deceased's inheritance.

(ii) Who may Exercise the *Retratto Successorio*?

Like the old Article 841 of the Code Napoleon, our law confers this right upon *"the other co-heirs or any of them"*.

It is immediately clear that this is only a facultative right and the co-heirs can renounce to the exercise thereof. The ultimate choice lies in the hands of co-heirs. *"La giurisprudenza e la dottrina sono unanimi nell'ammettere che gli eredi possono rinunciare al diritto*

[37] op. cit., n. 555; Baudry Lacantinerie et Wahl, op. cit. n. 2600
[38] op. cit., n. 2607
[39] This view is also upheld by Demolombe
[40] Cour de Cassation de Orleans, 29.2.1832
[41] Carmela Farrugia noe et vs Concetta Mintoff et, Court of Appeal, 10.6.1949, XXXIII.i.472
[44] Planiol et Ripert, op. cit, n. 342; Laurent, op. cit., n. 556

di retratto".[44] Nevertheless, there was a time when the Cour de Cassation attributed a public policy nature to this rule to the extent that we read in one of its rulings that *"Il retratto successorio riposa su dei motivi di ordine pubblico e nessuna convenzione fra cedente e cessionario puo' sottrarre questi alla applicazione del medesimo."*[45]

This right benefits *"tutti coloro i quali concorrono alla successione, non importa a qual titolo, come successori ab intestato, regolari od irregolari, o come legatari o donatari, possono esercitare il retratto."*[46] Jurists have also sought to establish a link between the active and passive subjects of this right. In one such comparison, Laurent[47] comments that *"Les personnes en situation d'exerçer le retrait sont justement celles qui n'auraient pas à le subir si elles étaient elles-mêmes cessionnaires des parts indivises ... ce sont d'une manière generale, et sous les restrictions indiquées plus haut, les successeurs universels, héritiers ou légataires. Il n'y a pas à distinguer s'ils ont accepté la succession purement et simplement ou sous benefice d'inventaire."* This would imply that it cannot be exercised by the beneficiaries of bequests by singular title and *"in ispecial modo [il retratto successorio] non spetta al legatario dell'usufrutto di tutta o di una parte della successione."*[48] It is still unclear whether this right is conferred to a co-heir who lacks sufficient resources to effect the relative payment, and needs to transfer the rights retrieved to be able to discharge his obligation. It is submitted that the right of redemption can still be exercised in these circumstances, given that all the requisites of Article 912 are satisfied, even if this scenario may not fit perfectly into the legislator's design for the institute.

Another interesting question arises where the co-heir who transferred his hereditary rights is himself entitled to exercise the *retratto successorio* against his own assignee. He may well have

[45] 15.5.1844, rep. In Baudry Lacantinerie et Wahl, op. cit.., n. 2626
[46] Planiol et Ripert, op. cit., n. 352
[47] op. cit., n. 556; This comparison is also drawn by Planiol et Ripert, op. cit., n. 352; Baudry Lacantinerie et Wahl, op. cit., n. 2621(Demante, Marcadé, Chabot, Demolombe)
[48] Cour de Cassation, 24.11.1847, rep. in Baudry Lacantinerie et Wahl, op. cit., n. 2623

acquired another share of the inheritance *causa morits* in the meantime. Laurent holds that such co-heir would no longer be able to redeem his own share.[49] Where, on the other hand, more than one co-heir have assigned their rights to a third party, it is held that any one of the co-heirs *"puo` esercitare il retratto contro i cessionari dei suoi coeredi. Egli non puo` pero` esercitare il retratto contro il proprio cessionario, poiche` disconoscerebbe, in tal modo, l'effetto obbligatorio delle sue convenzioni."*[50]

Furthermore, our Courts have added that a co-heir can only redeem the share of the inheritance transferred to a third party so long as he possesses his own hereditary rights. This principle was established in a series of cases regarding the inheritance of Maria Rosa Degabriele. In **Carmela Bonnici vs Michele Massa et**[51], the Court of Appeal held that *"Se alcuni dei coeredi cedono ad un terzo, in buona fide ed erroneamente, i loro diritto sulla eredita intera, gli altri coeredi non possono esercitare il retratto successorio contro il detto acquirente prima di aver esercitato l'azione di rivendica di tale loro quota ereditaria."* Subsequently, in **Nicola Bonnici vs Antonia Formosa et**[52], the Court clarified this point further:

"La cedola per cui viene esercitato il retratto prima che il retraente ovesse ottenuto la rescissione della cessione della propria quota ereditaria, e quindi prima che il retraente fosse rientrato nel possesso della propria quota, e valida, quando posteriormente a quel retratto la cessione suddetta viene rescissa, perche il retraente si ritiene avere avuto il possesso insin dal tempo dell'esercizio del retratto, e cio (i) in virtu della continuazione del possesso fra autore ed erede, malgrado la temporanea usurpazione, devendosi distinguiere tra il fatto del possesso ed il diritto del possesso; (ii) in virtu del principio che colui al quale spetti l'azione per ricuperare una cosa si ritiene avere la cosa medesima."

[49] op. cit.., n. 556; Baudry Lacantinerie et Wahl, op. cit., n. 2625
[50] Baudry Lacantinerie et Wahl, ibid. (supported by Demolombe and Aubry et Rau)
[51] 27.5.1907, XX.i.24
[52] 2.12.1921, XXIV.i.905

What if several persons in different lines and degrees are called to the inheritance[53] and only one of them[54] alienates his share of the inheritance? By whom would the *retratto successorio* be exercisable? Baudry Lacantinerie et Wahl[55] cite, and concur in, the view upheld by the Cour de Rouen[56] that *"Il retratto non puo` essere esercitato da un erede contro un altro erede di un altro erede di un altra linea, o ramo, che sia cessionario di un erede della prima."*

It is submitted that this fragmented approach frustrates the very objective of the institute.. All heirs, whether succeeding in the same or different lines or degrees, continue collectively the personality of the deceased. In virtue of this principle, they should all (collectively or individually) be able to redeem the rights assigned to a third party by any of them. Not even a restrictive interpretation[57] of this right would justify such exclusion, especially in view of the fact that our law grants this right to *"the other co-heirs or any of them"*[58], without further limitation or distinction. This reasoning was adopted by the Court of Appeal in **Marianna Debono vs Avv. Antonio Caruana et noe**[59] where it was stated that:

"Ko-eredi huma anki dawk li jkunu dixxendenti minn linji diversi in relazzjoni ma' xulxin fis-successjoni ta' l-awtur li tieghu huma kollha eredi. Meta wiehed mill-eredi appartenenti ghal linja jittrasferixxi l-kwota tieghu lil wiehed ta' linja ohra, ir-retratt successorju jista' jigi ezercitat, jekk ic-cessjoni tkun saret wara d-divizjoni ta' l-eredita' bejn iz-zewg linji."

[53] e.g. by vulgar substitution in terms of Article 751 of Civil Code
[54] Article 805 of Civil Code
[55] op. cit.., n. 2606. They also refer to Lebrun who concurs in this view.
[56] 21.7.1807 (rep. in n. 47 supra)
[57] Planiol et Ripert argue that in view of its exceptional nature, "si deve porre come regola di interpretazione che il retratto e un diritto eccezionale, e che a questo titolo devesi interpretare restrittivamente." (op. cit.., n. 343) confirmed by our Courts in Mose Calleja vs Nicola Bonnici, First Hall, 2.12.1926, XXVI.ii.353
[58] Article 912 of Civil Code (cited above)
[59] 23.2.1940, XXX.i.481

(iii) Nature of Transfer against which the *Retratto Successorio* can be exercised

(a) "Rights over the Inheritance"

This is another perfect shadow of Article 841 of the **Code Napoleon.**[60]

Article 585 of our Civil Code defines an *inheritance* as *"the estate of a person deceased"* comprising all his assets and liabilities. By a "disposition by universal title", *" the testator bequeaths to one or more persons the whole of his property or a portion thereof."*[61] It is immaterial, for our purposes, whether the assets so bequeathed are movable or immovable in nature. Article 912 makes it clear that this right can be exercised *"lorsqu'un cohéritier a cédé son droit entier à la succession et la totalité de ses droits successifs."*[62]

What is less clear is whether, and in what circumstances, can this right of redemption be exercised if only specific inherited assets are assigned to a third party. It is generally agreed that *"la cession d'une quote-part du droit à la succession est passible du retrait, aussi bien que la cession du droit tout entier."*[63] On the other hand, a judgment of the Cour de Cassation established that *"la cessione di diritti successori e quindi soggetta a retratto anche quando sia stata accompagnata dalla cessione di oggetti particolari, provenienti dalla successione."*[64] How are we to distinguish between an assignment of rights over an inheritance and a transfer of particular inherited assets?

Our yardstick should be whether the transferee would participate in the partition of the inheritance. Incidentally, this criterion takes us

[60] "son droit à la succession"
[61] Article 590(1) of Civil Code. This is termed as "univeralité partageable" by Demolombe, op. cit.., n. 78
[62] Demolombe, op. cit., n. 79; Baudry Lacantinerie et Wahl, Op. Cit., n. 2586; Planiol et Ripert, op. cit., n. 363
[63] This was also upheld by Merlin, Chabot, Toullier, Marcade, Aubry et Rau – vide Demolombe, ibid.
[64] 3.5.1830, reported in Baudry-Lacantinerie et Wahl, op.cit., n. 2589

back to the very origin of the institute.[65] This rule is clearly articulated by Demolombe – *"la loi, en effet, a voulu permettre aux héritiers d'écarter du partage le cessionnaire étranger; et dès lors elle n'a voulu autoriser le retrait que contre le cessionnaire qui à le droit de figurer lui-même au partage."*[66] If a co-heir transfers his share in one or more determinate assets pertaining to the deceased's estate, he would still be holding to himself his remaining rights over the inheritance. In supporting this argument, Demolombe further emphasizes that the object of partition is *"l'universalité elle-même, le jus universum"* wherein the transferee would acquire no right whatsoever.[67]

This issue was recently discussed by the Court of Appeal in the judgment **Emanuel Schembri noe vs Paul Camilleri et**[68]. Giuseppe Dimech and his wife Giovanna Dimech were co-owners of an immovable property in Mosta. After the death of her first husband, Giovanna remarried Schembri. She had three children from her first marriage – Salvatore, Cornelia and Angela. A 5/12th undivided share of this immovable devolved upon Salvatore Dimech while a 2/12th undivided share thereof devolved upon Angela Dimech. Salvatore, a bachelor, died in 1980 and his share devolved upon Angela, who now held a 7/12th undivided share thereof. Some time before passing away, Angela entered into a promise of sale agreement of said share with defendants. She died in 1992 and was inherited by *Id-Dar tal-Providenza,* which some time later, executed the promise of sale agreement. The heirs of Giuseppe Dimech and Giovanna Schembri (plaintiffs) contended that they had validly redeemed the 7/12th share of this immovable thus transferred to defendants by virtue of a schedule of redemption and deposit filed in the Registry of the First Hall of the Civil Court. Plaintiffs asked the Court to order defendants to sanction the solemn transfer of this share into the estate of their predecessors. The Court rejected this demand on the ground that this transfer

[65] This was upheld by Duranton – vide Demolombe (op. cit., n. 80)
[66] Demolombe, op. cit., n. 83
[67] Ibid.
[68] App. Civ. 297/97, 12.6.2001

related wholly to the estate of Angela Dimech only and clarified that:

"in realtà ... l-partijiet kontraenti kienu qeghdin jikkontemplaw semplici vendita ta' sehem indiviz ta' proprjeta' determinata u specifika. Minn imkien ma jirrizulta li l-konvenuti ... kienu qeghdin jakkwistaw xi kwota ereditarja, intiza din bhala porzjoni ta' unika attiva u passiva li tikkomponi l-eredita' tal-mejta Angela Dimech."

This ruling was subsequently re-affirmed by the First Hall of the Civil Court in the judgment **Mario Micallef et vs Joseph Difesa et**[69].

Continental jurists agree that this rule admits of no exceptions save in the case of fraud. In this regard, Planiol et Ripert[70] refer to a judgment by the Cour de Cassation[71] where, an estate comprised only one object. A contract of transfer of said object was drawn up bearing a later date. The contract was subsequently rescinded and replaced by another contract bearing a date preceding the actual date of partition. The Court authorized the exercise of the redemption by the other co-heirs on the ground that *fraus omnia corrumpit*.

(a) "Onerous Title"

The *retratto successorio* arises only with respect to an onerous transfer of the co-heir's rights over the inheritance. This aspect has to be considered in the light of the fact that the co-heir/s exercising the *retratto successorio* must reimburse the transferee with *"the price of the assignment, the expenses incurred on the occasion of such assignment and the interest on the price as from the day on which such price shall have been paid to the assignor".*[72]

[69] per Mr Justice Philip Sciberras, 2.2.2005
[70] op. cit.,, n. 366
[71] 4.11.1829 (Dalloz, Succession, n. 189)
[72] Article 912(1) of Civil Code

Sale is the *onerous title par excellence* which seems to have been in the mind of the legislator in framing this provision. However, problems may arise in the event of simulation, where a contract of donation conceals an effective sale of hereditary rights to eliminate the possibility of redemption by any of the co-heirs. As already asserted in relation to fraudulent transactions, it is generally held that such transfer would be deemed to be onerous in nature and the right of redemption still exercisable.[73] In fact, it is generally agreed that *"Il retratto è possibile, in qualsiasi forma la vendita abbia avuto luogo"*[74], whether it be made by a judicial sale by auction[75], an exchange[76] or in consideration for a life or perpetual annuity[77]. However, if a co-heir gratuitously assigns his hereditary rights to a third party (possibly in favour of a member of his family), this right of redemption would be excluded.[78]

What if the rights over the inheritance so transferred are subsequently alienated again by the transferee? Is this right of redemption exercisable at this second stage? Against whom should it then be directed? It is generally agreed that if the transferee assigns his acquired hereditary rights to a third party, the right of redemption defined in Article 192 can be exercised *"contro i successori del cessionario."*[79] Baudry Lacantinerie et Wahl hold that where the first transfer by the co-heir was onerous in nature, and the alienee subsequently assigns his rights to a third party by gratuitous title, the second alienee is still subject to the right of redemption by the co-heirs. On the basis of the general principle that no one can acquire more rights than those possessed by his

[73] Baudry-Lacantinerie et Wahl, op. cit., n. 2590; Planiol et Ripert, op. cit., n. 367

[74] Baudry-Lacantinerie et Wahl, op.cit., n. 2594

[75] Baudry-Lacantinerie et Wahl, ibid.; Planiol et Ripert, op. cit., n. 370

[76] Baudry-Lacantinerie et Wahl, ibid; Planiol et Ripert, Op. Cit., n. 366 ("Tutti gli autori in tanto si pronunciano pel retratto, e la Corte di Cassazione ha consacrata questa dottrina [19.10.1814] … la permuta e` una specie di vendita … Poco importa che non vi sia prezzo; il pemutante sara indennizzato dal retrattante, e tutto quello che possa domandare.")

[77] Baudry-Lacantinerie et Wahl, ibid

[78] Planiol et Ripert, op. cit., n. 367 (this rule was confirmed by a judgment of the Court of Lyon, 17.6.1825)

[79] Baudry-Lacantinerie et Wahl, op. cit., n. 2608, n. 2633 ("L'azione, in caso di cessioni successive, va diretta contro l'ultimo cessionario, proprietario attuale dei diritti alienati, e non contro il primo.")

predecessor, they conclude that *"Il cessionario a titolo gratuito, di un cessionario a titolo oneroso, e soggetto al retratto."*[80]

(iv) Time for the exercise of the *Retratto Successorio*

An important distinction between Article 912 of the Civil Code and its French counterpart lies in the period within which the right of redemption may be exercised under our law. The law reserves only one month for the schedule of redemption and the price to be lodged in court. Such period runs from the day on which notice of the assignment shall have been given to the co-heirs by means of a judicial act, unless the co-heirs shall have declared their intention to exercise their right of redemption within such time. In default, the co-heirs forfeit their right of redemption conferred by this provision.

As already discussed, this right can be exercised by all co-heirs, whether jointly or separately. Where the redemption is exercised by only one of the co-heirs (by means of a schedule of redemption and deposit filed in the Registry of the First Hall of the Civil Court), the others may avail themselves thereof, provided they declare their intention to do so within fifteen days of the notice given to them. It is thus advisable that the co-heir availing himself of this right gives notice thereof, by judicial act, to the other co-heirs. This respects the principle that the *retratto successorio "appartiene a ciascuno erede individualmente; essi possono riunirsi per agire, ma ciascun d'essi puo richiedere altresi il retratto per suo conto."*[81]

This interpretation was recently upheld by the First Hall of the Civil Court in **Frederick Testaferrata de Noto vs Emanuel Testaferrata de Noto.**[82] In this judgment, the Court held that:

[80] Op. cit., n. 2591, also supported by Merlin and Demolombe; Pothier, Des Retraits, n. 104: "Le rétrait, étant le droit de prendre le marché d'un autre, la donation, qui n'est pas un marché, n'en peut être susceptible."
[81] Planiol et Ripert, op. cit., n. 372
[82] Citaz. 2779/1997, 6.4.2001

"Il-jedd li l-art. 912(3) jaghti lill-ko-werriet huwa li jinghaqad mal-ko-werriet l-iehor fl-ezercizzju tal-jedd ta' rkupru. Dan jista' jaghmlu sakemm il-jedd ma tkunx lahaq gie akkwizit mill-ko-werriet l-iehor, ghax inkella l-ko-werriet li jfittex li jinghaqad fl-irkupru ma jkunx qieghed, filfatt, jinghaqad fl-irkupru izda jaghmel espropriazzjoni ta' jedd ga akkwizit mill-ko-werriet l-iehor. Dan huwa wkoll it-taghlim ta' l-awturi:

Si comprende tuttavia che l'uno dei coeredi non possa riservarsi il profitto tratto dal retratto se non quando il retratto stesso sia un fatto compiuto ..... [Baudry-Lacantinerie & Wahl, Delle Successioni, Vol III (Trattato Teorico-Pratico di Diritto Civile, Vol IX n. 2617]

Ghalhekk il-jedd ta' ko-werriet li jinghaqad ma' ko-werriet iehor li jkun ga beda l-process ta' l-irkupru jintemm jew fi zmien hmistax wara n-notifika li l-ko-werriet l-iehor ikun qed jezercita l-irkupru, jew meta l-ko-werriet l-iehor ikun finalment akkwista s-sehem tal-wirt minghand ic-cessjonarju, sakemm, f'dan it-tieni kaz, ikun ghadda wkoll iz-zmien ta' xahar min-notifika, mhux ta' l-irkupru, izda tac-cessjoni, ghax jekk l-irkupru jkun mitmum qabel ma jghaddi dak ix-xahar xorta ma jkunx jista' jcahhad lill-ko-werrieta l-ohra mill-jedd taghhom that l-art. 912(1) u (2) illi, mhux jinghaqdu fl-irkupru mibdi minn ko-werriet iehor, izda li jezercitaw l-irkupru huma stess iure proprio."

It is likely that problems would arise in the absence of such notice being given to the other co-heirs. Such failure lies at the root of the judgment **Nicola Bonnici vs Antonio Formosa et**[83]**,** where the Court of Appeal held that *"Quando la cessione di una quota ereditaria non e' notificata al coerede per atto giudiziario l'esercizio del retratto e' ammissibile sino alla divisione."*[84] Curiously enough, the Civil Court in **Giovanni Cassar vs Camillo Galea**[85] ruled that *"E` valido il retratto esercitato da uno dei coeredi, anche quando l'eredita, in quanto a stabili, e liquidata, e*

[83] 2.12.1921, XXIV.i.905

[84] "Que le rétrait successoral ne puisse plus être écércé après que le partage est terminé, cela est d'evidence", Demolombe, op. cit., n. 129

[85] per Onor. Giuseppe Gasan, 14.11.1890, XII.529

quando la divisione e gia convenuta." It is submitted that such an extensive interpretation of the *retratto successorio* serves merely to pave the way to abuse. This decision has been overruled in the judgment **Marianna Debono vs Avv. Antonio Caruana et noe**[86], where the Court of Appeal reaffirmed the established principle that *"Fil-kaz ta' cessjoni li tkun saret qabel id-divizjoni ... ma jistax jigi ezercitat kontra tieghu r-retratt successorju."*

3. Effects of the *Retratto Successorio*

It is generally agreed that the redemption by co-heir/s is neither an assignment of rights, nor operates a re-assignment of the rights of the alienor to the inheritance of the deceased. Planiol et Ripert[87] refer to the teachings of the *Cour de Cassation* and conclude that:

"Il retrattante prende il luogo del cessionario. Percio`, il contratto e` mantenuto; solamente il retrattante e` subrogato al compratore, quanto ai diritti ed oneri che risoltano dalle cessione. Il retratto non e` dunque una nuova vendita che il cessionario faccia al retrattante; non vi e` mutazione. Donde segue che non vi `e luogo a trascrivere la convenzione che interviene fra il retrattante e il cessionario ... basta percio` una semplice manifestazione di volonta` del retrattante; il consenso del cessionario non e' richiesto."[88]

Such redemption is only binding on the redemptor and the original assignee. Some writers[89] argue that it does not have retroactive effects, but merely operates this consolidation prospectively from the moment of the redemption. On the other hand, *Demolombe* cites the teachings of *Fontmaur* and *Pothier* that *"Le rétrait donc ne consiste que dans la substitution d'une personne a une autre, de persona in personam." Planiol et Ripert*[90] argue on the same lines

[86] 23.2.1940, XXX.i.481
[87] op. cit., n. 386
[88] This explains why it can be exercised by filing a schedule of redemption and deposit filed in the Court Registry
[89] op. cit., n. 139
[90] op. cit., n. 388

that *"il retrattato si considera come se non fosse stato mai compratore, e che il rettante si considera come se lo fosse stato sempre."* While a third party acquiring rights on such share of the inheritance after the transfer (but prior to the redemption) can easily contemplate this possibility and protect his rights accordingly, such retroactive effect can seriously prejudice innocent third parties in good faith and should therefore be ruled out.

Our Courts have also had the opportunity of discussing the effects of the *retratto successorio* when it is exercised by one of the spouses bound by the community of acquests. In terms of Article 1334(1) of the Civil Code, all property devolving upon one of the spouses by title of succession is deemed to be paraphernal property and pertains exclusively to such spouse. In **Mose Calleja vs Nicola Bonnici**[91], the First Hall of the Civil Court ruled that:

"L'immobile acquistato coll'esercizio del retratto successorio da uno dei coniugi spetta all'asse particolare di tale coniuge e non alla comunione degli acquisti coniugali. La ragione di cio si basa sul motivo di diritto generali per cui non si ritiene incluso nella comunione degli acquisti coniugali l'immobile che sia stato retratto da uno dei coniugi in esercizio di un titolo speciale proprio ed esclusivo del coniuge retraente, non potendo secondo la legge il retratto esercitarsi per comodo e vantaggio, sia in tutto sia in parte, di altri, come ancora sul motivo di diritto speciale al retratto successorio."

It is submitted, however, that in terms of Article 1320(e) and Article 1321(2) of the Civil Code, the other spouse will be entitled (in the event of a liquidation of the community of acquests) to a re-imbursement of one-half of the price and expenses paid on redemption

[91] 2.12.1926, XXV.ii.353

Concluding Remarks

Although we often overlook the *retratto successorio* in our legal studies, this short analysis highlights its complementary nature within the wider framework of succession law. This institute is the only conventional right of redemption[92] that has been saved by the legislator when the Maltese Parliament opted to abrogate the regime of legal redemption formerly applicable to transfers *inter vivos* [93]

On the other hand, one can legitimately question the contemporary relevance of this institute at a time when the legislator is no longer intent on securing the exclusion of persons not called to the succession of the deceased (whether by law or by will) from the partition of the estate. The amendments to the law of succession carried into effect by Act XVIII of 2004 are primarily directed towards the consolidation of the property, and the ascertainment of the title of each individual co-owner (or co-heir). These developments were clearly intended to facilitate the free transfer of property. This spirit can be traced both in the new provisions regulating co-ownership[94] as well as the new authentic definition of the reserved portion[95] over the estate of the deceased.

A reconsideration of the *retratto successorio* in the light of this spirit would easily converge with the stance, taken by the French legislature decades ago, that the protection of the right of ownership and the enhancement of the free transferability of private property tip the balance in favour of the total abrogation of this institute.

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April 2006

[92] Saving the right of redemption of perpetual emphytheusis (vide Article 1501 of Civil Code)
[93] Vide Act IV of 1961
[94] see Articles 495 and 495A of Civil Code (added by Articles 45 and 46 of Act XVIII of 2004)
[95] Article 615(2) of Civil Code (added by Article 58 of Act XVIII of 2004)